No. 89-1527

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RAILWAY LABOR EXECUTIVES' ASSOCIATION
AND UNITED TRANSPORTATION UNION,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY AND DAKOTA, MINNESOTA AND
EASTERN RAILROAD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

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QUESTION PRESENTED

Whether § 6 of the Railway Labor Act, 45 U.S.C. § 156, as construed in *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584 (1989), requires a rail carrier that has agreed to sell part of its rail lines to bargain with its employees' unions over its decision to sell and to postpone the sale pending completion of that bargaining.

RULE 29.1 STATEMENT

Respondent Chicago and North Western Transportation Company is a wholly owned subsidiary of CNW Corporation, which is wholly owned by Chicago & North Western Acquisition Corporation, which is wholly owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting UP preferred stock issued by Chicago & North Western Holdings Corporation. Petitioner Chicago & North Western Transportation Company has the following subsidiaries apart from wholly owned subsidiaries within the meaning of this Court's Rule 29.1: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc., and C&NW Realco, Inc.

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Respondent Chicago and North Western Transportation Company ("C&NW") respectfully submits this brief in opposition to the petition for a writ of certiorari of the Railway Labor Executives' Association ("RLEA") and the United Transportation Union to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

On July 2, 1986, C&NW agreed to sell a railroad line between Winona, Minnesota, and Rapid City, South Dakota, and to assign additional trackage in South Dakota to respondent Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), a newly formed rail carrier (J.A. 45-46, 55).[1] That line had generated substantial losses for several years, had previously been the subject of abandonment proceedings before the Interstate Commerce Commission ("ICC"), and at the time of the sale was in part inoperable due to debilitation of the track (J.A. 47, 54-57, 207, 215-25, 226, 230).

When they learned of the agreement to sell the line, seven of the unions representing C&NW employees served written notices on the C&NW proposing collective agreements that would require the C&NW to give the unions six months' advance notice of a proposed transfer of any of its lines, to provide employees who might be affected by a transfer with the labor protections typically imposed by the ICC on line abandonments, and to renegotiate its sale agreement with DM&E so as to require DM&E to hire all affected employees and apply the labor protections typically imposed by the Commission on mergers or consolidations of rail carriers (J.A. 8, 26-27, 42-43, 62, 188).[2] By serving these notices, ostensibly pursuant to § 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, the unions sought to initiate the Act's "purposely long and drawn out" procedures to settle "major disputes," those involving proposals to enter into or change collective bargaining agreements. *Railway Clerks* v. *Florida E.C. R. Co.*, 394 U.S. 238, 246 (1966).

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[1] "J.A." citations refer to the Joint Appendix in the court of appeals. "Pet." citations refer to the Petition for Certiorari, and "App." citations refer to its Appendices.

[2] The proposed agreements would provide the so-called *Oregon Short Line III* and *New York Dock* protections, the conditions that the ICC typically imposes on rail abandonments and mergers, respectively. See *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979); *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979).

The RLA requires the parties to bargain over notices of "an intended change in agreements affecting rates of pay, rules, and working conditions," § 6, and until the Act's major-dispute procedures are exhausted, neither party may unilaterally alter the status quo by resorting to self-help with respect to the subject of the dispute, §§ 2 Seventh, 5 First, 6 & 10, 45 U.S.C. §§ 152 Seventh, 155 First, 156 & 160. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). C&NW conferred with the unions about their proposals, but without prejudice to its contention that the RLA did not require it to bargain with the unions on these subjects (J.A. 62, 188-89, 190-91).

In August 1986, C&NW and DM&E obtained authority to consummate the transaction from the ICC under the Commission's "Ex Parte No. 392" class exemption for line sales under §§ 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 & 10901.[3] Neither of the petitioners nor any of the other unions representing C&NW employees contested the Commission's authorization of the transaction or asked the Commission to impose labor protective conditions on it.

RLEA initiated this litigation by filing a complaint in the United States District Court for the District of Minnesota on August 16, 1986. The complaint sought a declaratory judgment that C&NW's transfer of the line to DM&E would violate the mandatory bargaining and status quo provisions of the RLA (J.A. 4-5, 11-13). The complaint sought interlocutory and permanent injunctions requiring C&NW to maintain the status quo until it had reached agreements with RLEA's member unions (J.A. 13-14). After the district court denied RLEA's motion

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[3] *Dakota, Minnesota & Eastern R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). See *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *rev. denied mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

> support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

In the case at bar, the police were authorized to search for cocaine, controlled substances and drug paraphernalia and pursuant to that authority, had the right to search anywhere in the apartment where they believed such contrabands might be hidden. The facts establish, moreover, that the petitioner's jacket which was in the kitchen draped over a chair, was not identified prior to its search as belonging to anyone, and as a result, the police had every right to assume it was within the scope of the warrant and to search it to determine whether it contained any contraband.

In light of *United States v. Ross, supra*, then the police are not prohibited from searching a visitor's personal effects which are not on the person, and which are located on the premises when a search warrant is being executed and when such property is a part of the general content of the premises and is a plausible repository for the object of the search. To hold otherwise, would render it absolutely impossible for police officers to effectively search a premises. Indeed, where visitors are present, law enforcement officers would be incapable of discerning which items, clothing, and containers could be searched and which could not be searched. Visitors to the premises, moreover could obfuscate the search and confound police by announcing ownership of particular items in order to exempt those items from the scope of the search.

As discussed herein, the Court in *United States v. Ross*, recognized that "[w]hen a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case

of a home . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* at 821-822, 102 S. Ct at 2171. The Court further noted that this rule applies equally to all containers. Accordingly, it would be anomalous to the purpose of the search to require police officers to make the distinction between those articles of clothing and personal property that belong to the resident and those items that belong to the visitor prior to commencing the search. Not only would it be ineffective and unworkable to require law enforcement officers to inquire as to the ownership of various items of personal property, such a requirement would also be unreasonable, and it would be just as unreasonable for police to expect an appropriate response from individuals located on the premises, were police directed to inquire about ownership.

In this connection, Justice William Rehnquist, writing a dissent for this Court in *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), stated, "[a]n absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket." Thus, adoption of such a rule would allow visitors to the premises to frustrate the efforts of police by placing contraband among their ownership of various articles of clothing and containers thereby placing those items beyond the purview of the warrant. The Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Timothy Scott Reese*, 520 Pa. 29, 549 A.2d 909 (1988) stated that "[w]e cannot sanction any rule that through fraud and gamesmanship erects barriers to the effective and legitimate execution of search warrants."

In sum, it must be noted that the time of the search, the jacket was not being worn by petitioner and, therefore, the jacket cannot be characterized as an extension of Reese's person so as to propel its search into a search of Reese's person. The record reveals furthermore, that Officer Allen simply noticed the jacket

draped over the back of the chair and made a decision to search it in view of the fact that it is a common receptacle where contraband may be secreted.

Accordingly, the issues involved in the instant matter, as well as the resolution of those issues by the Pennsylvania Supreme Court may be read consistently with prior decisions of this Honorable Court and a review of that decision is both unnecessary and unwarranted.

CONCLUSION

Based upon the foregoing law and argument, respondent Commonwealth of Pennsylvania prays that this Honorable Court deny petitioner Timothy Scott Reese's petition for writ of certiorari to review the decision of the Supreme Court of Pennsylvania, which decision became final on January 5, 1990.

Respectfully submitted,

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